Public Prosecutor v Robin Ekok

HIGH COURT (KOTA KINABALU) — NO KK-45–15 OF 2010
DAVID WONG J
11 MAY 2012

Criminal Law — Penal Code — s 304(a) — Culpable homicide not amounting to murder — Circumstantial evidence — Intoxication — Dark night — Whether offence under s 302 of the Penal Code — Whether evidence in totality raised reasonable doubt — Intention to inflict specific injury in natural course of nature would cause death — Whether safe to convict as charged

Evidence — Circumstantial evidence — Conclusion from facts — Intoxication — Dark night — Whether evidence in totality raised reasonable doubt — Whether prima facie case established

The accused was charged with the offence of murder of one Darisie bin Godol under s 302 of the Penal Code ('Code') and was called to enter his defence. On the unfortunate day, the deceased was at PW2's house, drinking alcohol and later left to look for his cows in the plantation. PW3 testified that the deceased was heading towards the mosque, near the plantation. Meanwhile, the accused and PW14 were at the former's house drinking alcohol. The accused later fell asleep and was woken up by some noises from outside the house. He then took his 'bakakuk' and ran into the direction of the mosque. PW6 and PW14 testified that they later heard an explosion and gunshot noise, respectively. When the accused returned with the 'bakakuk', he said 'tidak tahu kena tidak'. Later in the evening, PW3 and PW5 found the deceased lying motionless on the roadside near the plantation. A pathology report disclosed that the deceased's death was caused by one gunshot wound to the abdomen. In order for the prosecution to establish a prima facie case, it must be proven that (i) Darisie in Godol was dead; (ii) the deceased died as a result of injuries sustained; (iii) the injuries were caused by acts of the accused; and (iv) the accused either caused the injuries with the intention of causing death or caused them to cause bodily injuries or caused them bodily injuries sufficient in the course of nature to cause death or committed acts that were imminently dangerous that they must all probability cause death. It was averred by the deputy public prosecutor that the evidence in totality led to the conclusion that the accused was guilty of the offence charge. Learned counsel for the accused submitted that the first three ingredients had been proven by the prosecution.

A His submission only dealt with ingredient (iv). The issue before the court was whether a prima facie case had been proven by the prosecution.

Held, convicting the accused to lesser offence of culpable homicide:

B (1) The prosecution had established a prima facie case as required by law. The evidence of PW13 and PW14 were found to be credible. Their demeanors were observed and there was no reason to disbelieve them. Furthermore, they were friends of the accused and there was no apparent reason as to why their evidence should be treated with suspicion. There C was also no reason tendered that the two witnesses were bias against the accused and their evidence was corroborated by other evidence such as the presence of gun powder residue in the 'bakakuk' as confirmed by the chemist. There was also the undisputed evidence of the sound of a gunshot near the mosque and the proximity of that sound and the return D of the accused back to his house with the 'bakakuk' and the claim 'tidak tahu kena tidak' to PW14 (see paras 20–21).

(2) The evidence in totality showed that there cannot be any other person apart from the accused who could have shot the deceased. The E circumstantial evidence was so neatly and tightly packaged that there had not been any breakage of the chain of the prosecution evidence. It was the accused who had shot the deceased (see para 22).

(3) The death was caused by a gunshot injury to the back of the body that F resulted in intra abdominal bleeding. When someone used a gun to inflict injuries, it can be safely inferred that his intention was to cause bodily injury which was sufficient in the ordinary course of nature cause of death. However, having heard the evidence of the accused and considering them together with the prosecution's evidence, the court was G of the view that the accused had not intended such specific injury (see para 29).

(4) The accused testified that he was drunk since afternoon until evening and this was confirmed by PW14, DW2 and DW3. In reference to s 85 of the Code, the accused had given credible explanation as to why he had H carried a gun with him on that fateful night. He had fired a shot and his intention was not to harm anyone (see para 30).

(5) The circumstantial evidence was that when taken together in totality, did not lead to the irresistible conclusion that the accused committed an I offence under s 302 of the Code. The evidence in totality had raised a reasonable doubt as to whether he had the intention to inflict the particular injury which he knew that in the natural course of nature would cause death, hence making it unsafe to convict as charged. Therefore, the accused was not guilty as charged under s 302 of the Code

but guilty and convicted of the lesser offence of culpable homicide not amounting to murder under s 304(a) of the Code (see para 36).

[Bahasa Malaysia summary

Tertuduh telah dituduh dengan kesalahan membunuh Darisie bin Godol di bawah s 302 Kanun Keseksaan ('Kanun') dan telah dipanggil untuk memasukkan pembelaan. Pada hari yang tidak bernasib baik tersebut, si mati berada di rumah PW2, minum arak dan kemudiannya beredar untuk mencari lembu-lembunya di ladang. PW3 telah memberi kenyataan bahawa si mati telah menuju ke arah masjid yang berdekatan dengan ladang tersebut. Sementara itu, tertuduh dan PW14 sedang berada di rumah tertuduh minum arak. Tertuduh kemudian tertidur dan terjaga oleh bunyi-bunyi di luar rumah. Dia kemudiannya mengambil 'bakakuk' dan berlari ke arah masjid. PW6 dan PW14 memberi kenyataan bahawa mereka kemudiannya terdengar bunyi letupan dan tembakan, masing-masing. Apabila tertuduh kembali dengan 'bakakuk' tersebut, dia berkata 'tidak tahu kena tidak'. Pada petang kemudiannya, PW3 dan PW5 terjumpa si mati terbaring tidak bergerak di tepi jalan berdekatan ladang tersebut. Laporan pathologi menunjukkan bahawa kematian si mati telah disebabkan oleh satu luka tembakan di abdomen. Bagi pihak pendakwaan untuk membuktikan kes prima facie, mereka hendaklah membuktikan bahawa (i) Darisie bin Godol telah mati; (ii) si mati telah mati akibat kecederaan yang telah dialami; (iii) kecederaan telah disebabkan oleh tindakan tertuduh; dan (iv) tertuduh sama ada telah menyebabkan kecederaan dengan niat untuk menyebabkan kematian atau melakukannya untuk menyebabkan kecederaan pada badan atau melakukannya kecederaan pada badan yang mencukupi dalam keadaan semulajadi untuk menyebabkan kematian atau melakukan tindakan yang sangat berbahaya yang berkemungkinan akan menyebabkan kematian. Adalah ditegaskan oleh timbalan pendakwa raya bahawa keterangan secara keseluruhan membawa kepada kesimpulan bahawa tertuduh adalah bersalah terhadap tuduhan kesalahan tersebut. Peguam yang bijaksana untuk tertuduh berhujah bahawa tiga unsur pertama tersebut hendaklah dibuktikan oleh pihak pendakwaan. Hujahannya hanya berurusan dengan unsur (iv). Isu di hadapan mahkamah adalah sama ada kes prima facie telah dibuktikan oleh pihak pendakwaan.

Diputuskan, mensabitkan tertuduh untuk kesalahan kecil homisid salah:

(1) Pihak pendakwaan telah membuktikan kes prima facie yang diperuntukkan oleh undang-undang. Keterangan PW13 dan PW14 telah didapati boleh dipercayai. Perilaku mereka telah diperhatikan dan tidak terdapat sebarang sebab untuk tidak mempercayai mereka. Selanjutnya, mereka merupakan sahabat tertuduh dan tiada sebab yang jelas mengapa keterangan seharusnya dilihat dengan syak wasangka. Tidak terdapat juga sebab yang dikemukakan bahawa kedua-dua saksi adalah berat sebelah terhadap tertuduh dan keterangan mereka telah

menyokong keterangan yang lain seperti kewujudan serbuk pistol di dalam 'bakakuk' seperti yang disahkan oleh ahli kimia. Terdapat juga keterangan yang tidak disangkalkan mengenai bunyi tembakan berdekatan dengan masjid dan jarak bunyi tersebut dan kepulangan tertuduh dengan 'bakakuk' ke rumahnya dan kenyataan 'tidak tahu kena tidak' kepada PW14 (lihat perengan 20–21).

(2) Keterangan dalam keseluruhan menunjukkan bahawa tidak mungkin ada orang lain selain daripada tertuduh yang boleh menembak si mati. Keterangan ikut keadaan telah disusun dengan kemas dan rapi bahawa tidak terdapat sebarang rekahan terhadap rangkaian keterangan pihak pendakwaan. Ia merupakan tertuduh yang telah menembak si mati (lihat perengan 22).

(3) Kematian yang disebabkan oleh luka tembakan pada belakang badan telah menyebabkan pendarahan dalam abdomen. Apabila seseorang menggunakan sepucuk pistol untuk melakukan kecederaan, adalah selamat untuk menganggap bahawa niatnya adalah untuk menyebabkan kecederaan pada badan yang mana mencukupi dalam keadaan semulajadi untuk menyebabkan kematian. Walau bagaimanapun, setelah mendengar keterangan tertuduh dan mengambil kira kesemuanya secara keseluruhan bersama keterangan pihak pendakwaan, mahkamah berpendapat bahawa tertuduh tidak berniat untuk melakukan kecederaan spesifik sedemikian (lihat perengan 29).

(4) Tertuduh memberi kenyataan bahawa dia mabuk sejak tengah hari sehingga petang dan ia telah disahkan oleh PW14, DW2 dan DW3. Merujuk kepada s 85 Kanun, tertuduh telah memberi keterangan yang boleh dipercayai mengapa dia membawa pistol dengannya pada malam kejadian tersebut. Dia telah melepaskan tembakan dan niatnya bukanlah untuk mencederakan sesiapa (lihat perengan 30).

(5) Keterangan ikut keadaan apabila diambil kira secara keseluruhannya, tidak membawa kepada kesimpulan tidak dapat dinafikan bahawa tertuduh telah melakukan kesalahan di bawah s 302 Kanun. Keterangan secara keseluruhan telah menimbulkan keraguan munasabah tentang sama ada dia berniat untuk melakukan kecederaan tersebut yang mana dia mengetahui dalam keadaan semulajadi boleh menyebabkan kematian, justeru menyebabkan ia tidak selamat untuk mensabit seperti dituduh. Oleh itu, tertuduh tidak bersalah seperti yang dituduh di bawah s 302 Kanun tetapi bersalah dan disabit untuk kesalahan kecil homisid salah yang tidak membawa kepada kematian di bawah s 304(a) Kanun (lihat perengan36).]

Notes

For a case on conclusion of facts, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 772.

For cases on s 304(a) of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1786–1788.

Cases referred to

Chan Chwen Kong v PP [1962] 1 MLJ 307; [1962] 1 LNS 22, CA (refd)
Chan Kwee Fong v PP [2010] 1 MLJ 441; [2010] 3 CLJ 671, CA (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 273; [1981] 1 LNS 129 (refd)
Karam Singh v PP [1967] 2 MLJ 25; [1967] 1 LNS 65, FC (refd)
Pendakwa Raya v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
PP v Chung Chung Kiang & 5 Others [2008] 8 MLJ 650; [2008] 1 LNS 400, HC (refd)
PP v Datuk Hj Harun bin Hj Idris (No 2) [1977] 1 MLJ 15; [1976] 1 LNS 97 (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)

Legislation referred to

Criminal Procedure Code s 182A
Penal Code ss 85, 300(c), 302, 304(a)

Raja Zaizul Faridah bt Raja Zaharudin (Deputy Public Prosecutor, Federal Attorney General's Chambers) for the prosecution.
Watti Junius (Junius Vung & Co) for the accused.

David Wong J:

THE CHARGE

[1] The accused is charged with the murder of one Darisie bin Godol between 10pm–10.30pm on 29 March 2009 and 10.30pm on 26 September 2006 at Jalan Kampung Bugaron Rosok in the District of Kota Belud, in the State of Sabah.

END OF THE PROSECUTION CASE

[2] On 2 December 2011, I had ordered that the accused to enter his defence. My reasons were as follows.

THE ESSENTIAL ELEMENTS

[3] In order to establish a prima facie case of murder, the prosecution, at the end of its case must prove the following:

(a) that Darisie bin Godol (deceased) is dead;

(b) that the deceased died as a result of injuries sustained by him;

(c) that the injuries of deceased were caused by or the result of the acts of the accused; and

(d) that in inflicting those injuries upon the deceased, the accused either:

(i) caused them with the intention of causing death on deceased; or

(ii) caused them with the intention of causing such bodily injuries on deceased as the accused knew to be likely to cause death; or

(iii) caused them with the intention of causing bodily injuries on deceased and such bodily injuries intended to be inflicted were sufficient in the ordinary course of nature to cause death; or

(iv) committed the acts that are imminently dangerous that they must in all probability cause death or such bodily injuries as are likely to cause death.

THE PROSECUTION CASE

[4] I was duty bound to apply a 'maximum evaluation of the prosecution's evidence' to determine whether a prima facie case had been made out. In the case of *Public Prosecutor v Chung Chung Kiang & Ors* [2008] 8 MLJ 650; [2008] 1 LNS 400, I had the opportunity to discuss what applying the 'maximum evaluation' approach actually involves and I came to the conclusion that it in fact involves applying the 'beyond reasonable doubt' test. My reasons in short were these. The Federal Court in *Pendakwa Raya v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 had held that at the end of prosecution's case, the court must ensure that the evidence after maximum evaluation is at such a level that if the accused remains silent the court must be willing to convict before defence is called. In another word the court must notionally presume that the accused had remained silent and as such also notionally treat the trial had ended. By virtue of that approach the court also cannot review the evidence if the accused chose to remain silent as was done by the courts prior to the maximum evaluation approach. The law is clear as to what the standard of proof is when the trial has ended and that is for the court to convict, the prosecution must have proved its case beyond reasonable doubt. This is what s 182A of the Criminal Procedure Code says:

> 182A Procedure at the conclusion of the trial
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the Prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the Prosecution has proved its case beyond reasonable doubt, the Court shall find the Accused guilty and he may be convicted on it.

(3) If the Court finds that the Prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[5] With that, I then embarked on a maximum evaluation of the evidence adduced by the prosecution to determine whether a prima facie case had been established.

[6] Learned counsel for the accused conceded that the first three ingredients had been proved by the prosecution and hence in his submission only dealt with ingredient 4. In criminal law, there is no concession, hence I was duty bound to deliberate whether the conceded ingredients had been proved.

DEATH OF THE DECEASED

[7] The deceased had been identified by several witnesses in the trial. These witnesses were PW3, PW4, PW5, PW12 and PW16, hence I was satisfied that this ingredient had been proved.

THE DEATH OF THE DECEASED CAUSED BY INJURIES INFLICTED ON THE DECEASED

[8] Dr Jessie Hiu (PW7) the pathologist had testified that the deceased's death was caused by one gunshot wound to the abdomen. PW7 in her expert report (P6) commented this:

He (Deceased) was shot once from a medium to long distance directed at the back of his body. The shot caused intra-abdominal injuries and bleeding resulting in death.

[9] This evidence was never disputed by the defence. Hence again I found that this ingredient had been proved.

THE DECEASED'S DEATH WAS CAUSED BY THE INJURIES INFLICTED BY THE ACCUSED

[10] In proving this ingredient the prosecution had relied on circumstantial evidence as there was no eye witness to the shooting incident. From the submission of the prosecution, it could be seen that the crucial evidence relied on is that of the evidence of PW13–PW14.

[11] Before I evaluated the evidence I kept foremost in my mind what

amounts circumstantial evidence as set out in the following cases. In *Chan Chwen Kong v Public Prosecution* [1962] 1 MLJ 307; [1962] 1 LNS 22, Thomson CJ (as he then was) observed:

> … where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?.

[12] In *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; [1967] 1 LNS 65, HT Ong FJ (as he then was) noted:

> … In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused …

[13] The Federal Court, in *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 38 stated:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

[14] In *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 273; [1981] 1 LNS 129 Syed Othman FJ (as he then was) had the following to say of a judge dealing with circumstantial evidence. At p 280 of the report, His Lordship opined:

> I am well aware that the 'irresistible' formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *Mc Greevy v Director of Public Prosecution* where it was argued at p 279, before the House of Lords that in criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused.

[15] To reiterate, there was no eye-witness version of the incident and as stated earlier the prosecution entirely based its case on circumstantial evidence. Learned DPP's submission in substance was that the evidence in its totality leads to the irresistible conclusion that the accused is guilty of the offence charged. The evidence upon which learned DPP relied on was this. On the

evening of 29 March 2009 at around 7pm, the deceased was at the residence of PW2 drinking alcohol and later left to look for his cows in the plantation. At around 9.30pm, PW3 and PW5 saw the deceased passing their residence and PW3 was told by the deceased that he was going to look for his cows and was heading towards the mosque near the plantation.

[16] PW14 and the accused at the material time were at the accused's residence drinking alcohol. At one point in time, PW14 had on the instruction of the accused climbed up the coconut tree to get some 'bahar' to continue drinking. Upon his return, PW14 found the accused to be asleep. However the accused was woken up by some noises from outside his house and asked PW14 who were making the noises and was told that they were the deceased and PW6. Upon hearing that, the deceased went and took his 'bakakuk' which was leaning on the wall and insert one bullet in the 'bakakuk'. Thereafter he said to PW14 'matilah kali ini' and ran into bush heading towards the direction of the mosque. PW6 confirmed that he was with the deceased outside the accused's house and was shouted at by the accused. PW6 had also testified that he heard an explosion like a sound of a firecracker not so long after he left the accused's house. PW14 also testified that he heard a gunshot noise from the direction of the mosque.

[17] Not long after he heard the gunshot, PW14 testified that the accused came back to bis house and saw him separating the 'bakakuk' component and put them on the table. The accused also said 'tidak tahu kena tidak'. The accused also told PW14 this — 'kalau saya (PW14) balik, saya adalah orang yang melaporkan'. PW14 complied with the accused's request not to leave as he was afraid of the accused.

[18] Later that evening, PW3 and PW5 saw the horse on which the deceased was riding passing by their house. And when the deceased did not come to fetch the horse, they went to look for and did find the deceased lying motionless on the road side near the plantation. They then lodged a police report on the death of the deceased.

[19] PW13 on 30 March 2009 woke up at around 6.30am in his brother's house and found out that there were police officers near the mosque. He then rushed to the accused's house to warn him that the presence of the police as he knew that the accused has in his possession of guns and weapons. When he arrived, PW13 saw, apart from the accused, PW14 who upon being informed of the presence of the police rushed from the accused's house. The accused however asked PW13 to assist him to hide the guns which the accused had put into a sack and given to him. The accused also took another sack. Both then headed towards the river and hid the sacks, one by PW13 under the platform in the river and the other by the accused across the river in the bush.

[20] Applying maximum evaluation to the evidence of the prosecution, I was of the view that the prosecution had established a prima facie case as required by law and my reasons were these. Despite the attack by learned counsel for the accused on the inconsistency between the evidence of PW13–PW14, I found their evidence to be credible. As pointed out by Raja Azlan Shah FJ (as His Majesty then was) said in *Public Prosecution v Datuk Hj Harun bin Hj Idris (No 2)* [1977] 1 MLJ 15 at p 19; [1976] 1 LNS 97:

> In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[21] I had observed the demeanours of both witnesses and saw no reason to disbelieve them. They were friends of the accused and there was no reason apparent to the court why I should treat their evidence with suspicion. Further there was no reason tendered in court that these two witnesses were bias against the accused. Furthermore their evidence was corroborated by other evidence such as the presence of gun powder residue in the 'bakakuk' as confirmed by the chemist in PW8. There was also the undisputed evidence that there was a sound of a gunshot near the mosque and proximity of that sound and the return of the accused back to his house with the 'bakakuk' and his claim of 'tidak tahu kena tidak' to PW14.

[22] It was contended that the prosecution had failed to establish a connection between exh 39 ('kelonsong'), the 'bakakuk' and its pellets that were found in the deceased body. I conceded that there was no nexus as contended by learned counsel for the accused and it would be preferable that the prosecution was able to show the connection. But of course proof can come in many forms and that was only one of the forms. As pointed out by the learned DPP, the evidence in its totality showed that there cannot be any other person apart from the accused who could have shot the deceased. I agree with the learned DPP that the circumstantial evidence was so neatly and tightly packaged that there had not been any breakage of the chain of the prosecution evidence.

[23] Hence I found that it was the accused who had shot the deceased.

INTENTION TO CAUSE HIM BODILY INJURY WHICH WAS SUFFICIENT IN THE ORDINARY COURSE OF NATURE TO CAUSE DEATH

[24] Accordingly to PW7 — Dr Jessie Hiu — the death was caused by a gunshot injury to the back of the body that resulting in intra abdominal bleeding. In my view when someone uses a gun to inflict injuries, it can be safely inferred that his intention is to cause bodily injury which is sufficient in the ordinary course of nature cause death. Accordingly I found that the prosecution had proved this ingredient.

[25] The above were my grounds and with that I now consider the evidence of the accused.

THE DEFENCE CASE

The law at the end of defence case

[26] At this juncture, I am obliged in law to again apply the 'maximum evaluation test' on all the evidence available; prosecution and defence, to determine whether or not the prosecution had proved its case beyond reasonable doubt (refer s 182A of the Criminal Procedure Code (*ibid*)). In order to evaluate all the evidence, the prosecution and the defence, I am obliged to determine whether the total evidence before the court has raised a reasonable doubt on the accused's guilt. The meaning of 'reasonable doubt' is defined in the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 where it was held:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. It has again been said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

A The issue at the end of defence case

[27] Having read the submission of learned counsel for the accused and the learned DPP and heard the sworn evidence of the defence witnesses, I need only to deliberate on the sole issue of whether the accused had intended to B inflict the particular injury to the deceased in the circumstances. This issue relates to s 300(c) of the Penal Code which the Court of Appeal in *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671 laid down the test in regard to s 300(c) of the Penal Code:

C [78] Section 300(c) of the Penal Code applies in the instant appeal. It states that the accused intended to cause bodily injury and that 'the bodily injury I intended to be inflicted is sufficient in the ordinary course of nature to cause death'. We would gratefully apply the test laid down by V Bose J, in *Virsa Singh v State of Punjab* AIR 1958 SC 465, at p 467, and there His Lordship said:

D

> In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the E prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have I intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that 'twelve good men and true' could readily F appreciate and understand.

[79] The essential elements necessary to satisfy s 300(c) of the Penal Code are set out in *Virsa Singh v State of Punjab*. There V Bose J, said at p 467 of the report:

G

> First, it must establish, quite objectively, that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that H some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course I of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

[28] I shall now apply the test.

[29] The injury which we are concerned with is the gunshot wound to the back of the deceased that caused intra abdominal bleeding. The factual issue before me is whether the accused had intended that specific injury. Having heard the evidence of the accused and considered them together with the prosecution's evidence, it is my considered view that the accused did not have such intention and my reasons are these:

The accused's drunkenness

[30] The accused testified that he was drinking since afternoon until evening on 29 March 2009. His evidence had been confirmed by the prosecution witness PW14 when he testified this:

(In examination-in-chief — p 85 of the notes of proceedings)

(Q:) kamu nyatakan sebentar tadi kamu berada di rumah Majinal minum tuak. Adakah kamu mabuk ketika tiba di rumah Kompong (Accused)?

(A:) Mabuk juga tapi sikit.

(Q:) Bagaimana pula dengan Kompong?

(A:) saya tengok dia mabuk jugalah.

(In cross-examination – p 93 of the notes of proceedings)

(Q:) Adakah keadaan si Robin (Accused) sangat mabuk bila dia balik Ice rumahnya dari rumah Majinal?

(A:) Dia boleh berjalan tapi terhuyung hayang.

(Q:) terhuyung hayang maksud kamu itulah keadaan orang yang sangat mabuk?

(A:) Ya.

[31] At the same time, DW2 and DW3 also confirmed that the accused was intoxicated on that night. I appreciate the submission by the learned DPP that pursuant to s 85 of the Penal Code, intoxication shall not constitute a defence to any criminal charge except that if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and the state of intoxication was caused without his consent; or the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

[32] However, the question before the court is not whether or not the level of the intoxication of the accused could constitute a defence. This is because the accused at the material time was not in a high advanced stage of drunkenness which he did not know what he was doing. He could still walk home together

with PW14 after consuming alcohol. Instead, the question is, considering the stage of intoxication of the accused, whether or not the accused had intended to inflict that particular injury to the deceased which had caused death in the ordinary course of nature.

[33] After considering the evidence of the accused and also his demeanour in court, I find that his had given credible explanation as to why he had carried a gun with him on that fateful night. He also admitted that he had fired the gunshot. This is what he testified (p 122 of the notes of proceedings):

(Q:) ada kamu terfikir dengan membawa bakakuk pada malam itu, atau adakah kamu sedar tindakan kamu pada malam itu akan membahayakan atau mencederakan seseorang?

(A:) tidak.

(Q:) ada kamu bertujuan akan menembak seseorang?

(A:) tidak.

(Q:) kalau tidak kenapa kamu bawa bakakuk?

(A:) tujuan saya bawa bakakuk hanya untuk membuat amaran meletupkan senjata itu kepada pencuri-pencuri yang masuk dalam pagar saya pada malam itu.

(Q:) sekiranya kamu syaki ada orang pencuri apa yang kamu akan buat?

(A:) saya melepaskan tembakan ke atas untuk sebagai amaran sahaja.

Dark night

[34] It is undisputed that the surrounding area of the crime scene was dark on that night. DW1 testified that he could not see anyone outside the house (refer p 123 of the notes of proceedings):

(Q:) Ada kamu nampak seseorang pada masa kamu berada di luar rumah kamu malam 29.3.2009?

(A:) tidak kerana sangat gelap.

[35] Prosecution witness PW4 testified this (p 18 of the notes of proceedings):

(Q:) Pada malam kamu jumpa Derisie sewaktu terlentang dijalanraya, adakah malam itu sangat gelap?

(A:) Ya, memang pada waktu berlaku waktu malam dan memang gelap tapi oleh kerana say a membawa kereta dan menyuluh dari jauh jadi keadaan waktu itu teranglah.

[36] To recap I had found a prima facie case purely on circumstantial evidence but after hearing the defence witnesses, the circumstantial evidence is such that when taken together in its totality they do not irresistibly lead to the conclusion that the accused have committed an offence under s 302 of the Penal Code. The evidence in its totality in my view had raised a reasonable doubt as to whether he had the intention to inflict the particular injury which he knew that in the natural course of nature would cause death, hence making it unsafe to convict as charged.

CONCLUSION

[37] For all the reasons given above, I find the accused not guilty as charged under s 302 of the Penal Code but find him guilty and convict him of the lesser offence of culpable homicide not amounting to murder under s 304(a) of the Penal Code. I will now hear mitigation on the sentence to be imposed.

Accused convicted to lesser offence of culpable homicide.

Reported by Ibnu Aswan